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No. 88-1357

In the Supreme Court of the United States

OCTOBER TERM, 1988

RAYMOND L. UGALDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's allegations of ineffective assistance of counsel constituted "newly discovered evidence" within the meaning of Fed. R. Crim. P. 33.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 861 F.2d 802.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1988. A petition for rehearing was denied on January 3, 1989. The petition for a writ of certiorari was filed on February 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to avoid currency transaction reporting requirements, in violation of 18 U.S.C. 371, and on four counts of knowingly and willfully causing Texas

American Bank to fail to file currency transaction reports, in violation of 31 U.S.C. 5313 and 5322(b). He was sentenced to a total of three years' imprisonment and a $3000 fine. The court of appeals affirmed (Pet. App. 1a-17a).

1. Petitioner's appointed trial counsel filed a timely notice of appeal from the judgment of conviction. Petitioner thereafter retained new counsel. Eight months after the verdict, while the case was pending in the court of appeals, petitioner's new lawyer filed a motion in the district court requesting a new trial. Petitioner alleged that his trial lawyer had rendered ineffective assistance of counsel. The court of appeals remanded the case to the district court to permit that court to address the new trial motion. Pet. App. 2a-3a.

The district court denied petitioner's motion. *Id.* at 3a. The court concluded that because the motion was filed eight months after the verdict, it was untimely under Fed. R. Crim. P. 33, which requires motions for a new trial to be filed within seven days after a guilty verdict (or within such further time as the court may provide during the seven day period) unless the motion is based upon "newly discovered evidence."[1] Petitioner's evidence of ineffective assistance of counsel, the district found, was not "newly discovered" within the meaning of Rule 33. Pet. App. 3a.

[1] At the time of petitioner's new trial motion, Fed. R. Crim. P. 33 provided in relevant part:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment * * *. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

A technical amendment in 1987 made no substantive change in the rule. See Notes to Rule 33 of the Advisory Committee on Rules.

2. The court of appeals affirmed (Pet. App. 6a-17a). The court concluded that petitioner's evidence of ineffective assistance of counsel was not "newly discovered" for purposes of Rule 33, and that his ineffective assistance claim therefore could not be raised under the "newly discovered evidence" provision of that Rule. The court first held that facts about counsel's performance that the defendant knew by the end of the trial, but did not appreciate to be legally significant, cannot be considered "newly discovered." Pet. App. 7a. The court reasoned that "Rule 33 on its face requires that the evidence itself, not merely the legal implications of the evidence, be 'newly discovered.' " *Ibid.* Thus, the court held, "known but unappreciated facts" cannot support a claim under the "newly discovered evidence" provision of Rule 33. Pet. App. 9a.

Next, the court rejected petitioner's claim that his motion for a new trial was timely because it relied in part on facts about his trial counsel's performance that petitioner discovered only after the end of the trial. The court held that even as to those facts, a claim of ineffective assistance of counsel cannot support a motion for a new trial based on "newly discovered" evidence under Rule 33. Pet. App. 10a-17a. Relying on *United States* v. *Johnson*, 327 U.S. 106 (1946), the court stressed that "the primary purpose of the newly discovered evidence rule is to afford relief when, 'despite the fair conduct of the trial, . . . facts unknown at the trial' make clear that 'substantial justice was not done.' " Pet. App. 11a. The court found that this policy would not be served by allowing Rule 33 to be used to raise ineffective assistance claims based on facts regarding counsel's performance discovered after the trial.

The remedy of a new trial based on newly discovered evidence, the court reasoned, is generally limited to cases in which the " 'newly discovered evidence' [is] evidence

going to the issue of the defendant's innocence" (Pet. App. 14a-15a). The court declined to create an exception to that general principle for allegations of "newly discovered evidence" of ineffectiveness on the part of trial counsel. Pet. App. 15a. The court observed that a contrary rule would "greatly expand the opportunities to make a late request for a new trial," thus " 'delay[ing] . . . the enforcement of just sentences.' " *Ibid.* (quoting *Johnson*, 327 U.S. at 112). Moreover, allowing new trial motions based on newly discovered evidence of ineffective assistance of counsel would result in a different standard being applied to such claims than to other claims of newly discovered evidence.[2] Pet. App. 16a. The court added that "defendants prejudiced by ineffective assistance of counsel have a ready remedy" under 28 U.S.C. 2255. Pet. App. 15a. "That mechanism," the court explained, "rather than a new trial [motion], seems best to accommodate the interests in finality and fairness with respect to ineffective assistance of counsel claims." *Ibid.*

Finally, the court held that even under the usual standards applicable to a Rule 33 motion based on newly discovered evidence, petitioner's claim was not well founded. Pet. App. 16a. Petitioner had failed to show that his "newly discovered" evidence could not have been

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[2] A lower standard would be required under *Strickland* v. *Washington*, 466 U.S. 668 (1984), which holds that to obtain a new trial because of ineffective assistance, the defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The *Strickland* Court made clear that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case," the showing that is "widely used * * * for assessing motions for new trial based on newly discovered evidence." *Id.* at 693-694.

discovered by the time of trial with the exercise of diligence. "None of the evidence which [petitioner] contends is 'newly discovered' would have remained unknown to him had he diligently sought such information." *Ibid.* Accordingly, the court found, denying petitioner the opportunity to claim ineffective assistance of counsel through a new trial motion "imposes no hardship upon [petitioner]." *Ibid.* The court therefore affirmed petitioner's conviction "without prejudice to his right to raise the [ineffective assistance of counsel claim] in a proper proceeding pursuant to 28 U.S.C. § 2255." *Id.* at 4a.

ARGUMENT

1. Petitioner contends (Pet. 3-5) that Fed. R. Crim. P. 33 authorizes him to move for a new trial up to two years after the verdict when the motion rests on "newly discovered evidence" of trial counsel's ineffectiveness. None of petitioner's new evidence consisted of exculpatory information that might have gone before a jury if petitioner had been aware of it. Rather, petitioner's new evidence relates solely to his trial counsel's performance. The court of appeals correctly rejected petitioner's argument. Pet. App. 6a-9a.

a. A defendant who is aware of the facts regarding his counsel's performance at trial cannot realistically be said to "discover" those facts later for purposes of Rule 33. To hold otherwise would contradict the plain language of the Rule, which requires that the evidence at issue be "newly discovered." Fed. R. Crim. P. 33. The requirement of "newly discovered" evidence is not satisfied simply because successor counsel, with the benefit of hindsight, has sifted the trial record in light of applicable Sixth Amendment standards and decided that trial counsel's actions can be

challenged as ineffective.[3] While "most defendants cannot and do not realize the inadequacies of trial counsel's performance until well after trial, * * * [t]he practical difficulties faced by defendants * * * do not give us cause to corrupt the clear language of Rule 33." *United States* v. *Dukes*, 727 F.2d 34, 39 (2d Cir. 1984); see also *United States* v. *Brown*, 742 F.2d 363, 368 (7th Cir. 1984); *United States* v. *Lara-Hernandez*, 588 F.2d 272, 275 (9th Cir. 1978); *United States* v. *Ellison*, 557 F.2d 128, 133 (7th Cir.), cert. denied, 434 U.S. 965 (1977).

b. The court of appeals was also correct in holding (Pet. App. 9a-16a) that even when the facts relating to an ineffective assistance claim are unknown to a defendant during trial, those facts do not constitute "newly discovered evidence" for purposes of Rule 33. The court of appeals' analysis is founded on the purposes of a new trial motion based on newly discovered evidence, the costs of expanding that form of relief to encompass claims of ineffective assistance of counsel, and the adequacy of post-conviction collateral attack as a vehicle to present those claims.

This Court has recognized that the paramount purpose of the newly discovered evidence rule is to afford relief when, "despite the fair conduct of the trial, * * * facts unknown at the time of trial" make clear that "substantial

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[3] The bulk of petitioner's allegations consist of nothing more. For example, petitioner claims that his counsel was "inadequately prepared" for trial, that counsel made "tactical" errors, such as failing to object and failing to cross-examine certain witnesses and to call others, and that counsel waived an objection to venue in the Western District of Texas and permitted petitioner's currency indictment to be consolidated with a RICO indictment charging petitioner and others with drug smuggling. Pet. App. 9a. The court of appeals was correct in holding that each of those complaints "rest[s] upon facts within [petitioner's] knowledge at the time of trial" (*ibid.*).

justice was not done." *United States* v. *Johnson*, 327 U.S. at 112. The classic use of the newly discovered evidence rule is thus to present new evidence of the defendant's innocence that was not available to the defendant at trial despite his exercise of diligence. In such cases, courts have generally held that a "motion for new trial based on newly discovered evidence 'may not be granted unless . . . the facts discovered are of such nature that they will probably change the result if a new trial is granted . . . they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and . . . they are not merely cumulative or impeaching.' " *Taylor* v. *Illinois*, 108 S.Ct. 646, 655 n.18 (1988) (quoting *Lloyd* v. *Gill*, 406 F.2d 585, 587 (5th Cir. 1969)).[4] Cf. *United States* v. *Agurs*, 427 U.S. 97, 111 & n.19 (1976) (lower materiality standard applies to a new trial motion based on newly discovered exculpatory evidence that was in the government's possession during trial, but not disclosed to the defendant for use at trial in violation of his due process rights).

As the court of appeals recognized (Pet. App. 13a-14a), the newly discovered evidence rule has been used to consider new trial motions based on allegations of jury tampering, even though such claims do not go directly to the defendant's guilt or innocence. See *United States* v. *Jones*, 597 F.2d 485, 488-489 (5th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *Holmes* v. *United States*, 284 F.2d 716, 719 (4th Cir. 1960). That exception has not been

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[4] See also *INS* v. *Abudu*, 108 S. Ct. 904, 913 n.12 (1988) (new trial should be granted only if the "newly discovered evidence 'would probably lead to an acquittal in the event of a [new] trial' ") (quoting *United States* v. *Tucker*, 836 F.2d 334, 336 (7th Cir.), cert. denied, 109 S. Ct. 143 (1988)); *United States* v. *Agurs*, 427 U.S. 97, 111 & n.19 (1976) (new trial should be granted if "newly discovered evidence [from a neutral source after trial] probably would have resulted in acquittal").

broadly construed, however, and the court in this case properly declined "to create a new exception to the general rule that 'newly discovered evidence' means evidence going to the issue of the defendant's innocence." Pet. App. 14a-15a. As the court of appeals explained, to permit "newly discovered evidence" of counsel's ineffectiveness to serve as the basis for a new trial motion more than seven days after the verdict would not add to the protection of a defendant's constitutional rights, and it would have the unfortunate effect of delaying the execution of sentences and the completion of direct appeals. The court of appeals stated:

> If we were to create such an exception for [newly discovered] evidence of ineffective assistance of counsel, we would greatly expand the opportunities to make a late request for a new trial. Defendants could easily search out some fact about their lawyer's pre-trial preparation, and make that fact the basis for an otherwise untimely motion for new trial. Such motions would rarely succeed, but they could allow defendants to "delay . . . the enforcement of just sentences," a consequence against which Justice Black warned us forty years ago.

Ibid. (quoting *United States* v. *Johnson*, 327 U.S. at 112).

Denying relief under Rule 33 does not in any way impair the defendant's right to relief from constitutionally deficient representation, because a defendant in petitioner's position can raise his ineffectiveness claim on a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. Allowing petitioner's ineffectiveness claim to be advanced on a new trial motion alleging newly discovered evidence is not necessary to ensure him a hearing on his claim; it is simply a more cumbersome procedural device for achieving the same result.

Permitting ineffective assistance claims to be litigated under the "newly discovered evidence" provision of Rule 33 is cumbersome not only because it often interferes with the prompt disposition of criminal cases on direct appeal, but also because it can create confusion as to the standard of review to be applied with respect to "newly discovered evidence" claims. As the court of appeals explained, if petitioner's allegation of ineffectiveness were construed to fall within the "newly discovered evidence" provision of Rule 33, the courts would have to tailor "a new, softer standard of review to govern this special breed of 'newly discovered evidence' motion." Pet. App. 16a. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court held that a defendant seeking to set aside a criminal judgment based on counsel's actual ineffectiveness must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The Court rejected the invitation to apply a stricter standard, modeled on the standard for new trial motions based on newly discovered evidence. *Id.* at 693-694. That standard, the Court noted, requires the defendant to show that it is "more likely than not" that the newly discovered evidence would alter the outcome of the case. *Id.* at 693. But, the Court reasoned, the standard for newly discovered evidence claims "presupposes that all the essential elements of a * * * fair proceeding were present," while "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable." *Id.* at 694. Accordingly, the Court distinguished between cases involving newly discovered evidence and cases involving ineffectiveness claims. That distinction counsels against characterizing assertions of in-

effective assistance of counsel as a type of newly discovered evidence claim within the meaning of Rule 33.[5]

2. Petitioner contends (Pet. 4-5) that *United States* v. *Cronic*, 466 U.S. 648 (1984), authorizes the raising of ineffectiveness claims under the "newly discovered evidence" provision of Rule 33. The footnote in *Cronic* on which he relies, 466 U.S. at 667 n.42, addresses the question whether ineffective assistance claims can be considered on direct appeal. The government argued that such claims should not be considered on direct appeal because they are usually not raised in the district court and preserved for appellate review until the defendant seeks collateral relief from the judgment. The *Cronic* footnote explained that when an ineffectiveness claim has been raised below, a court of appeals can review it on direct appeal, and it added that a district court has jurisdiction to hear a Rule 33 motion even though a case is pending on direct appeal. But the government did not argue, and the Court did not address, the issue presented in this case—whether a claim of ineffective assistance of counsel may be pursued under the "newly discovered evidence" provision of Rule 33. See Gov't Br. 40-41 n.30, *United States* v. *Cronic*, No. 82-660.[6]

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[5] The Court in *Strickland* noted that the principles governing ineffectiveness claims "should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial," 466 U.S. at 697, but that remark cannot be understood to mean that ineffectiveness claims can be raised under the "newly discovered evidence" provision of Rule 33. Rather, it suggests only that when ineffectiveness claims are properly raised on motions for a new trial—in the federal system, under the provision of Rule 33 permitting the court to grant a new trial "in the interest of justice"—the standard for evaluating the claims should be the same as in any other setting.

[6] In *Cronic* itself, the motion for a new trial was made more than seven days after the verdict. 466 U.S. at 652. That fact, however,

3. Petitioner also contends (Pet. 6-7) that there is a conflict among the circuits on the question presented in the petition that warrants this Court's review. In addition to the court below, the Second, Seventh, and Ninth Circuits have declined to allow ineffective assistance claims to be made through Rule 33 "newly discovered evidence" motions. *United States* v. *Brown*, 742 F.2d 363, 368 (7th Cir. 1984); *United States* v. *Dukes*, 727 F.2d 34, 39 (2d Cir. 1984); *United States* v. *Lara-Hernandez*, 588 F.2d 272, 275 (9th Cir. 1978); *United States* v. *Ellison*, 557 F.2d 128, 133 (7th Cir.), cert. denied, 434 U.S. 965 (1977). In several older decisions, however, the D.C. Circuit has suggested that a contrary rule is applicable. *United States* v. *Brown*, 476 F.2d 933, 935 n.11 (D.C. Cir. 1973); *United States* v. *Thompson*, 475 F.2d 931, 932 & n.4 (D.C. Cir. 1973); *United States* v. *Smallwood*, 473 F.2d 98, 104 (D.C. Cir. 1972) (Bazelon, J., concurring). See also *United States* v. *Decoster*, 624 F.2d 196, 207 (D.C. Cir. 1976) (en banc), cert. denied, 444 U.S. 944 (1979). Although the D.C. Circuit cases do conflict with the approach taken in other circuits, the rationale underlying the D.C. Circuit's approach has been undermined by this Court's decision in *Strickland* v. *Washington, supra.* The conflict, therefore, may well resolve itself without the need for this Court's intervention.

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played no role in the Court's analysis. In our reply brief in *Cronic*, we noted in passing that the defendant's allegations of ineffective assistance did not refer to newly discovered facts and therefore "would not appear to be cognizable in a motion for a new trial based on newly discovered evidence" (Gov't Reply Br. 10 n.8, *United States* v. *Cronic*, No. 82-660). But we did not make the more specific argument, which is at issue here, that ineffective assistance claims cannot properly be raised more than seven days after verdict under Rule 33, because such claims do not involve the type of "newly discovered" evidence that Rule 33 was meant to address.

As the court of appeals noted, the approach taken in the D.C. Circuit cases was "apparently based upon an effort * * * to ameliorate the differences between the direct appeal and habeas standards for reviewing ineffective assistance of counsel" claims. Pet. App. 8a-9a. Thus, *Brown, Thompson,* and *Smallwood* each involved allegations of actual ineffectiveness raised on direct appeal. Rather than "relegating" the defendants to a collateral attack, where the court of appeals believed that a more compelling showing of ineffectiveness was required, the court stated that defendants could supplement the trial record with evidence of actual ineffectiveness by filing a new trial motion based on "newly discovered evidence." *United States* v. *Thompson,* 475 F.2d at 932 & n.3 ("[a]ppellant is not relegated to his post-conviction remedies to secure a hearing on his claim" of ineffective assistance); *United States* v. *Smallwood,* 473 F.2d at 103, 104 (Bazelon, J., concurring) (noting a "very harsh" standard applied in the "early collateral attack cases involving ineffective assistance," and suggesting that a defendant need not be "relegate[d]" to those remedies); cf. *United States* v. *Decoster,* 624 F.2d at 204-207 (plurality opinion) (noting that D.C. Circuit had formerly insisted upon a higher showing of ineffective assistance on collateral attack than on direct appeal).

After *Strickland* v. *Washington, supra,* however, the premise underlying the rule in the D.C. Circuit cases—that different standards apply on direct and collateral review—is no longer the law. *Strickland* establishes that the same constitutional test of actual ineffectiveness applies on direct appeal and on collateral review. See 466 U.S. at 697. Accordingly, there is no reason to assume that the D.C. Circuit will adhere to its prior, minority view if and when it has occasion to reconsider the issue in a post-*Strickland* case.

Even assuming there is a live conflict on this issue, the question is not one that demands a single rule applicable to all federal courts. At bottom, the issue raised here is only a narrow procedural one concerning the timing of the district court's consideration of an ineffectiveness claim. Because the substantive standard governing the right to relief is the same under either the majority or the minority approaches, the majority rule is not prejudicial to defendants. And while we believe that the majority view better serves the interests of judicial economy, concerns of procedural efficiency can properly be left to the courts of appeals to resolve in different ways as they see fit.

4. In any event, petitioner would not be helped by the construction of Rule 33 that he proposes. The court of appeals, in its alternative holding, ruled that even accepting petitioner's argument as to the proper construction of Rule 33, petitioner's new evidence of ineffectiveness would not have satisfied the rules applicable to motions for a new trial based on newly discovered evidence. Specifically, the court stated that "[n]one of the evidence which [petitioner] contends is 'newly discovered' would have remained unknown to him had he diligently sought such information." Pet. App. 16a. Accordingly, petitioner would not have prevailed "under the restrictive standards applied to *any* Rule 33 motion filed more than seven days after conviction." *Ibid.* See, *e.g.*, *United States* v. *Vergara*, 714 F.2d 21, 22 (5th Cir. 1983) (defendant must have exercised reasonable diligence in order to prevail on claim of newly discovered evidence).

The court's determination that with the exercise of proper diligence petitioner would have known at trial the facts he claims to have discovered later is correct and in any event does not warrant this Court's review. Petitioner asserted that his trial counsel (1) "spent too little time studying documentary evidence"; (2) failed to consult with

petitioner regarding the transfer of his indictment; (3) failed to advise petitioner of his rights with respect to a new indictment; and (4) failed to consult with previously retained counsel. Pet. App. 16a. As the court of appeals observed, these were "easily discoverable" facts, which petitioner could have discovered if he had paid diligent attention to his counsel's representation. *Ibid.* Petitioner, therefore, would not have been entitled to consideration of the merits of his new trial motion under Rule 33 even under the approach that he advocates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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